# In the Supreme Court
OF THE
# United States

October Term, 1925.

273
53

No. [redacted] 51

SACRAMENTO NAVIGATION COMPANY
(a corporation),
*Petitioner,*

vs.

MILTON H. SALZ, doing business as
E. Salz & Son,
*Respondent.*

## BRIEF FOR RESPONDENT.

S. HASKET DERBY,
CARROLL SINGLE,
Merchants Exchange Bldg., San Francisco,
*Proctors for Respondent.*

Parker Printing Company, 523 Clay Street, San Francisco

# Index.

## Table of Cases.

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*Respondent.*

## BRIEF FOR RESPONDENT.

This case is here on a writ of certiorari issued to the Circuit Court of Appeals for the Ninth Circuit which affirmed a decree of the District Court for the Northern District of California in favor of respondent and against petitioner for the sum of $11,964.83 with interest and costs.

### STATEMENT OF FACTS.

As petitioner's brief does not clearly present all of the facts in the case, we prefer to make our own statement of the same.

Respondent

~~Petitioner~~ brought suit "in a cause of towage and damages, civil and maritime" (Record, p. 5), seeking to recover for the *negligent towage* of his cargo of barley (loaded on petitioner's barge "Tennessee") by petitioner's steamer "San Joaquin No. 4" (Id. 6-7). It appears that this barley was shipped on board the barge "Tennessee" at two upper river landings on the Sacramento River (Celli's and Woods Break) for transportation to Port Costa and that two shipping receipts were issued therefor containing the conditions of carriage (see Shipping Receipts not printed; also Record, pp, 111, 115; also Petitioner's Brief, p. 2). It is our contention, upheld by the two lower courts, that these shipping receipts evidenced contracts made solely *with the barge.* The shipping receipts give "the privilege of towing with one steamer, at the same time *between Sacramento and San Francisco,* down or up, two or more barges", but the steamer "San Joaquin No. 4" is not specifically mentioned and, indeed, the words "Str. Red Bluff" appear stamped on the receipts. This is mentioned for the purpose of showing that petitioner could have made this tow with *any* steamer and could have hired a steamer from *another company* to make it.

After the above receipts were issued and the barley loaded on the "Tennessee" at the river landings above mentioned, the "Tennesee" proceeded to Sacramento in some way not shown by the record. It is obvious, however, that she was *not* then in tow of the "San Joaquin No. 4" and possibly not in tow of any steamer, for it clearly appears from the testimony of petitioner's pres-

ident that the *upper* river where the barley was loaded is narrow, crooked and shallow and very difficult to navigate, the channel being at times scarcely wider than the barge itself and that men put on the "San Joaquin No. 4" are only so placed *after* being trained on the upper river (Record, pp. 111-112). At any rate it is clear from the testimony that the tow in question only began at Sacramento (Id. pp. 25-26).

*At Sacramento* the "Tennessee" and also three other barges were picked up by the said "San Joaquin No. 4" and the voyage from there to Port Costa was begun (Record, pp. 25-26). Thereafter the towing steamer brought the "Tennessee" into collision with the British steamer "Ravenrock" and, as a consequence, the barge sank and respondent's cargo was lost. That the negligence of the "San Joaquin No. 4" caused this collision and loss was disputed in the trial court, but was there found as a fact (Record, pp. 117-118) and, as a condition of omitting a large part of the record on appeal, was conceded by petitioner for the purposes of said appeal (Id. p. 127) and is again conceded in this court (Petitioner's Brief, p. 4).

Petitioner frequently refers to the carrying vessel in this case as being the "steamboat-plus-barge" and ridicules the contention that the barge alone is the carrier under the shipping receipts. It refers to the barge as being "helpless" and "without motive power", which it has not proved to be the case, but, assuming it to be so, the record clearly shows that the barge is an important element in the transportation. It has a pilot house on

an elevated bridge, with four rudders on the stern, carries a regular barge pilot and crew (Record, p. 96) and has its own steering and navigation to attend to (Id. p. 102). This at least is shown to be the case as to the *front* barge on the tow from Sacramento and must be assumed to be true of the other barges on the voyage from the upper river landings *to* Sacramento, where there was no privilege to tow more than one barge at a time and where, as pointed out, the navigation is so much more difficult and dangerous. These points may not be very important, but they demolish petitioner's implication that the barge is a negligible factor in the contract of carriage.

Petitioner says that "it should be particularly noted that the libel was promoted against petitioner *in personam* as owner of the barge and the negligent steamer" (Brief, p. 3). If the "San Joaquin No. 4" was liable *in rem*, her owner is of course liable *in personam* and, as a matter of fact, the suit was brought *in personam* for purposes of convenience and the accommodation of both parties and, perhaps also, to enable respondent to take advantage of any rights it might have against the *barge* (if she had proved unseaworthy). Respondent's theory all through the case, however, has been that the petitioner, *as the owner of the towing steamer,* and *not* as the owner of the barge, was responsible for the negligent towage, expressly alleged in the libel, and the suit should, of course, be considered on the same basis as if brought *in rem* against the towing steamer.

This, then, is a case of loss due to negligent towage and would be a very simple one if it were not for the

fact that both the barge and the steamer were owned or operated by the same company. Owing to this common ownership or operation*, however, petitioner contends that it is absolved from liability (a) under the Harter Act and (b) under the provisions of the shipping receipts.

Our contentions, on the contrary, are (a) that the Harter Act does not apply as between tug and tow and (b) that the provisions of the shipping receipts (1) are only applicable to the "Tennessee" and *not* to the "San Joaquin No. 4", (2) do not, by their terms, purport to cover negligent towage and (3) even if so construed, are invalid under the law of tug and tow.

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## ARGUMENT.

### I.

### THE HARTER ACT DOES NOT APPLY.

We will, for purposes of clarity, divide this subject into two headings, the first dealing with the contract between the parties and the second with the law applicable thereto, although both subjects are interwoven.

### A.

**The Contract between the Parties.**

Petitioner frequently says in its brief that this is not a case of *towage*, but of affreightment, and, in doing so, it loses sight of *what* contract is involved and assumes

*Note: Although petitioner's defense is grounded solely on this basis of common ownership, it being conceded that the Harter Act does not apply to the ordinary case of tug and tow, it goes far afield in supporting its contentions and *most* of its arguments are applicable to *all* towage cases.

that this contract is evidenced by the shipping receipts. The last named contract *is,* of course, one of *affreightment,* but this is not true *as regards the relations existing between respondent and the "San Joaquin No. 4".* As to the latter the case is one of *towage* and the "privilege of towing" given in the shipping receipts itself shows this.

Petitioner says that it is a misnomer to state that the contracts evidenced by the shipping receipts were made *with the barge*—that they were made "with the petitioner, a transportation company, and not with the barge". This involves a fundamental misconception of the relation between ships and shippers. Literally, of course, no contract is ever made *with a ship*—a ship has no mouth to speak with or pen to write with. But when a bill of lading is made out and the name of the ship on which the goods are to be transported is inserted therein, *the contract becomes one with the named ship* and that ship is bound to its performance. And this is true whether, as in the old days, the contract is signed by the master or, as in modern times is generally the case, by the shipowner himself or his agents. And so when, as in the present case, the name of the barge "Tennessee" was inserted in ink on the shipping receipts as the vessel "on board" which the respondent's barley was shipped, that ship and no other was the one with which the contract of affreightment was made.

Petitioner implies that the "Tennessee", being a "powerless barge", is merely "a part" of the steamer moving it and not the real vessel "transporting" the cargo.

Overlooking the fact that this argument would apply to *all* cases of tug and tow (when the tows are barges) it is not sound. We have already pointed out that this barge with bridge, rudders and crew is possessed of important functions in navigating. Barges (even without rudders) are clearly "vessels" subject to the admiralty jurisdiction (*Ex parte Easton,* 95 U. S. 68; 24 L. Ed. 373, at p. 375; 1 *Corpus Juris* 1264-1265 and cases there cited). They are also subject to the Harter Act and the Limitation Act (see 6 Fed. Stats. Ann. 2 ed. 387). In the latter Act it was originally provided that it should not apply to barges used in river or inland navigation (R. S., Sec. 4289; 6 F. S. A. 367), but the Act was amended in 1886 so as to expressly include such barges (Act of June 19, 1886, ch. 421, Sec. 4; 24 St. L. 80; 6 F. S. A. 367) and there was never any such limitation in the Harter Act. Petitioner's implication that a barge alone cannot be a "vessel transporting merchandise" within the latter Act, is refuted by *Ex parte Easton,* cited supra, where this court says:

> "Goods of vast amount are *transported* by such means of conveyance."

The foregoing is merely cited to illustrate the entire reasonableness of the holding of the two lower courts that the contract evidenced by the shipping receipts was made with the barge only and *not* with the towing steamer. But those receipts are *not* the contract sued on in this case—it is the towage contract (or rather the relation arising out of the towage) that is sued on.

Petitioner also frequently says that there was no towage contract made in this case. Admitting that respond-

ent may not have itself expressly made a towage contract, it granted petitioner the "privilege of towing" and, even apart from this, the fact remains clear that contracts can be implied as well as express and when petitioner engaged its steamer for the tow, it made an implied contract with respondent for such towage, as, indeed, the Circuit Court of Appeals held in the case at bar (Record, p. 141). If petitioner had engaged the steamer of a third party to make the tow, such steamer would clearly have made an implied contract with respondent through the petitioner and would obviously have been liable for the loss (whether *ex contractu* or *ex delicto* is immaterial). How then can petitioner be relieved when it engaged its own steamer?

The foregoing (perhaps not too well put) may tend to clear up petitioner's erroneous conception that we must recover on our shipping receipts or not at all. The recovery we are asking for is not based on these shipping receipts, but is based on the relation of tug and tow existing between the towing steamer "San Joaquin No. 4" and respondent's cargo of barley. This will be made clearer as we proceed with the second branch of the argument under this heading.

B.

**The Law Applicable to the Situation under the Harter Act.**

Section 3 of the Harter Act provides as follows:

> "Sec. 3. (Limitation of Liability for Negligent Navigation, Dangers of the Sea, Acts of God, Etc.) That if the owner of *any vessel transporting merchandise* or property to or from any port in the United States of America shall exercise due diligence to make *the said vessel* in all respects seaworthy

> and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting *from faults or errors in navigation,* or in the management *of said vessel* * * *."

The above italicizing *clearly* shows in our opinion that the section is only applicable as a defense *to the vessel on which the cargo is carried* and as said in the case of *The Delaware,* 161 U. S. 459; 40 L. Ed. 771, its provisions *"have no possible application to the relations of one vessel to another"*—a holding frequently quoted and approved in other cases.

This is further borne out by the case of *The Irrawaddy,* 171 U. S. 187; 43 L. Ed. 130, 133 where the court says:

> "Upon the whole we think that in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing and to limit the relief from their operation afforded by the statute to that called for by the language itself of the statute."

We entirely agree with petitioner that the *facts* in the cases of *The Delaware* and *The Irrawaddy* are in no way similar to the facts in the case at bar, but the principles there laid down are *directly applicable* and are necessitated by a reading of the Harter Act as above quoted. And, if those principles are applicable (especially under the rule of *strict* construction), then it is clear that the provisions of the Harter Act "have no possible application to the relations of the 'San Joaquin No. 4' to the 'Tennessee' and her cargo".

Fortunately, however, we are not compelled to rely solely on the above two cases, but are able to cite three well reasoned cases (besides the one in the case at bar), passing through both the District Court and the Circuit Court of Appeals, wherein it is squarely held that the Harter Act has no application to the relations of tug and tow, *even where the tug and tow are, as in the case at bar, owned by the same person.* This court, of course, is not bound by those decisions, but their unanimity seems to us to be highly persuasive.

In *The Murrell,* 200 Fed. 826, where the barge on which libelant's cargo was being transported was owned by the same person who owned the tug and where the question of the tug's liability to the tow was directly involved and where also it was contended that the Harter Act applied as a defense, the court said in part (at pp. 829-832):

> "(5) That the Harter Act has no application to negligent towage when tug and tow belong to distinct owners, having with each other only the relations arising under an ordinary contract for safe towage, I shall take for granted. To say that the owner of the tug, in such a case, is 'engaged in transporting merchandise or property', is to extend those words of the Harter Act so as to make them include what Congress never intended them to include. If this is not obviously true, I must regard it as beyond question since the decision in the Delaware, 161 U. S. 459, 471, 16 Sup. Ct. 516, 522 (40 L. Ed. 771). In holding that the act could not exempt the owner of one vessel from liability for damage negligently inflicted by collision upon another, the Supreme Court said:

'It is entirely clear that the whole object of the act is to modify the relations previously existing between a vessel and her cargo.' "

* * * * * * *

"The petitioner, as has appeared, was using two vessels in the transportation of the barge's cargo—one of them the barge upon which the coal was laden, and whose cargo it was in the ordinary sense; the other, the tug, which furnished the motive power and controlled the general direction, not only for the barge, but for another vessel not brought into this case. If, as the Supreme Court has said, the Harter Act has no other object than to modify the relations previously existing between a vessel and her cargo, it is necessary, in order to apply it in this case, to find some sense in which the cargo of the barge can properly be called the cargo of the tug. There is no more reason for saying that the West Virginia's cargo may be called the cargo of the tug than for saying that the cargo of the other barge might be so described. Neither barge was being towed alongside the tug. Neither the subcharter of the barge nor the bill of lading given for the coal on board her has been offered in evidence, and it does not appear that either of them refers to this or any particular tug as having any connection with the contract for transportation made with the owner of the coal. *To that contract the owner of the tug may indeed have been one of the parties, but there is nothing to show that anything to be done by this particular tug was contracted for.* If the mutual obligations between cargo and carrying vessel could ever have arisen between the tug and the cargo here in question, they could only have arisen from the fact that the tug was actually towing the barge containing the cargo and they could have had no existence before such actual towage began. No reason whatever appears for calling the coal on board the barge cargo of the tug until the barge was taken in tow. Before that time there was no reason whatever for

calling it the cargo of any other vessel than the barge. *The petitioner's contention thus requires it to be regarded as at one time the cargo of the barge only, and at a later time the cargo of the tug as well, there being also at that time another cargo with an equal claim to be regarded as the tug's cargo. It is difficult to believe that a construction of the Harter Act which involves results of this kind could have been intended by Congress.*"

The two italicized portions of the above quotation show how peculiarly applicable the case is to the case at bar. Nothing to be done by the "San Joaquin No. 4" was contracted for and in fact the only steamer mentioned in the bills of lading was the "Red Bluff" (see Shipping Receipts). The "Tennessee" moved from its loading places to Sacramento before the towing steamer picked her up. There was *other* cargo besides respondent's on the "Tennessee" and *other barges* also were towed with still other cargoes (Record, pp. 26, 111). Thus, to sustain petitioner's contention, the cargo must be "regarded as at one time the cargo of the barge only, and at a later time the cargo of the tug as well, there being at that time another cargo with an equal claim to be regarded as the tug's cargo". It is, indeed, difficult to believe that the Harter Act was intended to involve results of this kind and to make the cargo *on all four barges* the cargo of the towing steamer, which also undoubtedly carried cargo of its own.

The case last cited was affirmed on appeal in *Baltimore & Boston Barge Co. v. Eastern Coal Co.,* 195 Fed. 483, where the court said in part (at p. 485):

"Clearly on its face the Harter Act had in mind not so much a broad principle, as only the relations

which exist between a vessel and the cargo with which she is herself laden. From that point of view there is enough to justify the following expression in the opinion in behalf of the Circuit Court of Appeals in Ralli v. N. Y. & Y. S. S. Co., 154 Fed. 286, 83 C. C. A. 290, decided on April 30, 1907 by a strong court:

> 'Manifestly this section deals with a specific vessel; i. e. the vessel *on which* the merchandise is being transported.'
>
> This refers to the third section of the Harter Act, but inevitably it must be taken to concern the whole of the statute. Consequently, in any view, we are obliged to sustain the conclusions of the District Court."

Exactly the same point was involved and the same conclusion was reached in the case of *The Coastwise,* 230 Fed. 505, and, in affirming this decision on appeal, the Circuit Court of Appeals for the First Circuit said (233 Fed. 1, 3-4):

> "It will be seen that, in The Murrell, this court had before it the case of an agreement by the owner of a tug to tow another owner's vessel; and this court held that there is nothing in such agreement to make the latter vessel, or her cargo, the cargo of the tug. In view of the reasoning of the Supreme Court in The Delaware, it seems clear also that there is nothing in the agreement by the owner of a tug to tow another vessel which can be regarded as making the latter vessel, or her cargo, the cargo of the tug, even when such other vessel belongs to the same owner as the tug. And, in our opinion, this is the law. *A careful examination of the language and history of the Harter Act leads us to the conclusion that section 3 is dealing with the specific vessel on which the merchandise is being transported.* The Irrawaddy, 171 U. S. 187, 195, 196, 18 Sup.

Ct. 831; 43 L. Ed. 130; Ralli v. New York & T. S. S. Co., 154 Fed. 287; 83 C. C. A. 290. A similar case was considered by this court, but not decided, in The Cygnet, 126 Fed. 742, 745; 61 C. C. A. 348.

The proofs in the case at bar, however, present a still stronger case for the libelant. *Here the contract of towage was made by the tug; the bill of lading for the cargo was made by the barge.* It is clear, then, that, up to the time when the hawser was passed from the tug to the barge, the coal was the cargo of the barge alone. If, then, we follow the claimant's contention, we are compelled to hold that the cargo was at one time the cargo of the barge alone, and at a later time the cargo of the tug as well. We must conclude, as Judge Dodge did in deciding The Murrell, in the District Court, 200 Fed. 826, 831, that it is difficult to believe that Congress intended a construction of the Harter Act leading to such a result.

* * *

* * * * * * *

The general rule is stated by the Circuit Court of Appeals in the Second Circuit in The W. G. Mason, 142 Fed. 913, 918; 74 C. C. A. 83, 88, where, in speaking for the court, Judge Wallace said:

> 'A tug and her tow are deemed a single vessel under steam, within the meaning of the rules of navigation for preventing collision; but *it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations as between themselves or their several liabilities to respond for the consequences of a fault of one of them.* Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault.'

Judge Wallace cited The James Gray v. John Frazer, 21 How. 184; 16 L. Ed. 106; Sturgis v. Boyer, 24 How. 110; 16 L. Ed. 591; The Carrie L. Tyler, 106 Fed. 422; 45 C. C. A. 374; 54 L. R. A. 236.

> Upon the proofs in the case at bar, and upon the facts found correctly by the District Court, it is clear, and we must hold, that, within the meaning of the Harter Act, the tug and the barge were not one entity, and the tug Coastwise was not 'transporting merchandise or property'.
>
> The claimant is not exonerated by the Harter Act from liability for loss of the cargo."

This language is especially significant here, because it lays emphasis on the very fact emphasized by both of the lower courts in this case, namely, that the bill of lading for the cargo was made *with the barge* and *not* with the tug.

We feel no need to comment on the attempts of petitioner to distinguish these cases or to conclude that they are wrongly decided. When petitioner says, however, that

> "it makes no contention that respondent's cargo was at one time, or ever, the cargo of the barge alone, and at a later time the cargo of the tug as well" (Brief, p. 31),

it overlooks the patent fact that, at the time the "San Joaquin No. 4" picked up the "Tennessee" at Sacramento, the upper river passage (and the most dangerous part of the voyage) had already been completed and that it neglected to show in the record *how* it was completed. It says that the cargo was "at all times" the cargo of "steamer-plus-barge", but neglects to manifest the "steamer" for the first leg of the voyage. It also wholly neglects to disclose the part played by the "Tennessee" in the voyage from Sacramento to Port Costa.

In line with the above two cases of *The Murrell* and *The Coastwise* from the First Circuit and the case at bar

from the Ninth Circuit is the case of *Bradley v. Lehigh Valley R. R. Co.,* 145 Fed. 569, 573; affirmed in 153 Fed. 350, 352, from the Second Circuit. In that case wheat was being transported under a through contract of affreightment and, at the time of the disaster, was on board a canal boat in tow of a tug, both being owned by the defendant. It was held by the District Court and assumed, if not decided, by the Circuit Court of Appeals that the defendant railroad company could not take advantage of the Harter Act as the owners of the tug, though they could do so as the owners of the canal boat (the common carrier), *if* (as the Circuit Court of Appeals held was not the case), the latter had been proved seaworthy and the negligent navigation had been that of the captain of the canal boat. In that case, as in the case at bar, there was no express towage contract, but, as before stated, the wheat was being moved under a through contract of affreightment with the defendant railroad company which owned both vessels. The District Court said (145 Fed. at p. 573):

> "The loss here apparently occurred through the negligence of the tug, notwithstanding the seaworthiness of the Dean, and there does not seem to be anything in the Harter Act which tends to exonerate her owner from liability therefor. The question as to the application of that statute to a case where both the tug and tow were owned or controlled by one person has not apparently been decided. It was raised in The Cygnet, 126 Fed. 742; 61 C. C. A. 348, before the circuit court of appeals for the first circuit but it was there found unnecessary to decide the question. In The Nettie Quill (D. C.) 124 Fed. 667, a locomotive carried on a barge towed by that steamer was dumped overboard. There a bill of

lading was issued by the steamboat and the court, Toulmin, J., decided that the contract was one of affreightment, rather than of towage, and the Harter Act applied, but there can be no question of the kind here as the relation of the tug was one of towage.

Here there was no such connection between the tug and the wheat, as would bring the Act into operation. The relief afforded by the Act should not be unduly extended and, in the absence of authority making it applicable to a case of this kind, I think that the owner of the tug should be held, unless some defense exists by reason of the insurance of the wheat."

The Circuit Court of Appeals said (153 Fed. at p. 352):

"If the tug was negligent, the railroad company as her owner was, *of course,* responsible. If the tug was not negligent, the company was responsible for the breach of its duty as a common carrier to carry the wheat safely on the Dean (the canal boat), because the disaster was caused in part at least by the conduct of the captain of the Dean."

If the case in question was correctly decided, it is an exact counterpart of the case at bar, the only difference being that the "Dean" was not proved to be seaworthy and the "Tennessee" was, thus exonerating the latter. The *towage* question is exactly the same in both cases and the "steamer-plus-barge" argument did not appear to receive the court's approval.

We feel that we could safely rest on this branch of the case at this point, but it seems wise to review briefly some of the decisions relied on by petitioner.

Petitioner cites the decisions of the Circuit Court of Appeals for the Ninth Circuit in *The Columbia,* 73 Fed.

226; *The Seven Bells,* 241 Fed. 43 and *The Thielbek,* 241 Fed. 209, as holding or intimating that tug and tow become one vessel for the purposes of the voyage or "one instrumentality in the voyage". This might be so for some purposes, but in none of these cases was it held or even intimated that the Harter Act would be a defense to the towing vessel in a suit brought by the owner of the cargo on the vessel that was being towed. They are therefore not in point, as expressly held by the *same* court in the case at bar. We will, however, briefly distinguish these cases from our own standpoint.

*The Columbia,* 73 Fed. 226, was a proceeding for limitation of liability, in which it was held that the tug and tow were one vessel for the purpose of that proceeding and must both be surrendered. There is no holding or intimation that the tug was not responsible for loss of cargo on the tow.

In *The Seven Bells,* 241 Fed. 43, the owner of cargo on a barge being towed *recovered* from the owners of both the launch and the tow (the owners of the barge being held to be also the owners of the launch *pro hac vice*—see p. 45) on the ground that the launch was insufficiently equipped to handle the barge. The passage relied on by petitioner (Brief, p. 18) is pure dictum and there is no holding that the Harter Act applies to the tug. Moreover the court does not hold, as stated by petitioner, that the contract was *not* one of towage, but that it was not "a *mere* contract of towage". That the case is plainly distinguishable is indicated by the fact that the judge who decided the case in the lower court was the same

judge who decided the case at bar and that the same Circuit Court of Appeals decided both cases.

In *The Thielbek,* 241 Fed. 210, it was held that the tug and tow were guilty of no negligence as regards a third vessel, the relations of the tug and tow not being involved. It is intimated that the tug and tow are to be considered as one vessel *for the purpose of navigation,* i. e. regarding liability to a third party.

The most that these cases can be said to establish is that for certain purposes (not involving the Harter Act or the relations of the vessels *to each other*) the tug and tow are to be considered as a unit. While this conclusion in no way affects the case at bar, it somewhat clarifies the situation to point out that said conclusion is opposed to the following decisions in other circuits on this point as to the unity of the two vessels.

*Van Eyken v. Erie R. Co.,* 117 Fed. 712, 717;
*The W. G. Mason,* 142 Fed. 913;
*The Transfer No. 21,* 248 Fed. 459;
*The Erie Lighter 108,* 250 Fed. 490, 497-498.

The conflict between these two sets of cases was, in our opinion, finally set at rest by the decision of the Supreme Court of the United States in *Liverpool etc. Navigation Company v. Brooklyn etc. Terminal,* 251 U. S. 48; 64 L. Ed. 130. In that case, the tug "Intrepid", having lashed *alongside her* a disabled tug and a tow of car floats came into collision with the steamer "Vauban". In holding (contrary to the decision in the Ninth Circuit in *The Columbia,* supra) that, to obtain limitation of liability, it was only necessary to surrender the "In-

trepid" (and not the attached car floats also) the court said, in part:

> "The car float was the vessel that came into contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid, that fact does not affect the question of responsibility (Citing cases). These cases show that for the purposes of liability the passive instrument of the harm *does not become one with the actively responsible vessel by being attached to it.* If this were a proceeding in rem it may be assumed that the car float and disabled tug would escape, and none the less that they were lashed to the Intrepid, and so were more helplessly under its control than in the ordinary case of a tow.
>
> It is said, however, that when you come to limiting liability, the foregoing authorities are not controlling—that the object of the statute is 'to limit the liability of vessel owners to their interest in the *adventure*' (The Main v. Williams, 152 U. S. 122, 131, 38 L. Ed. 381, 384, 14 Sup. Ct. Rep. 486), and that the same reason that requires the surrender of boats and apparel requires the surrender of the other instrumentalities by means of which the tug was rendering the services for which it was paid. It can make no difference, it is argued, whether the cargo is carried in the hold of the tug or is towed in another vessel. *But that is the question, and it is not answered by putting it.* The respondent answers the argument with the suggestion that, if sound, it supplies a different rule in actions in personam from that which, as we have said, governs suits in rem. Without dwelling upon that, we are of opinion that the statute does not warrant the distinction for which the petitioner contends. * * *
>
> The words of the statute are: 'The liability of the owner of any vessel for any injury by collision shall in no case exceed the value of the interest of such owner in such vessel'. The literal meaning of

> the sentence is reinforced by the words 'in no case'. For clearly the liability would be made to exceed the interest of the owner 'in such vessel' if you said frankly, 'In some cases we propose to count other vessels in although they are not "such vessel";' and it comes to the same thing when you profess a formal compliance with the words, but reach the result by artificially construing 'such vessel' to include other vessels if only they are tied to it."

Petitioner seeks to distinguish this case (and to reconcile *The Columbia,* supra, with it) on the ground that it involves an "injury by collision" under the Limited Liability Act and that "in order to arrive at the interest of the owner in the offending vessel, it was necessary to differentiate between the two vessels and to determine *which one* of the two vessels committed the *injury*" (Brief, p. 16). Counsel overlooks the broad scope of the Limitation Act, which not only covers "injury by collision", but "any loss or damage" and "any act, matter, or thing, loss, damage or forfeiture, done, occasioned or incurred". It is submitted that if, in the case at bar, limitation had been sought by petitioner, it would (as in the *Liverpool* case) have only been compelled to surrender the towing steamer and *not* the barge, because the former alone was responsible for the loss. And just as, under the Limitation Act, only the vessel doing the damage can be held liable, so, under the Harter Act, only the vessel *actually carrying the cargo* can claim its benefit. We think it clear that the one conclusion follows the other and we have already shown that a fair reading of the Harter Act involves this construction and certainly a *strict* construction of the same (which this court has held to be necessary) involves it.

It is therefore submitted that this decision sets at rest the idea that, in the case at bar, the steamer "San Joaquin No. 4" and the barge "Tennessee" were a single instrumentality for the purpose of the voyage. It also makes it clear that respondent, as the innocent owner of cargo shipped on the "Tennessee", could have sued the "San Joaquin No. 4" as a *separate* vessel *in rem* and he equally can, as he has done, sue her owners *in personam,* even though they also owned the vessel that was being towed.

Petitioner also cites the case of *The Nettie Quill,* 124 Fed. 667. The court there held that, even if the contract were one of towage, there was no breach of the towage obligation and therefore no liability. As regards the other point as to the contract being one of affreightment, the court lays stress on the fact that said contract was made *"with the steamboat"* and bases its decision on that ground, as, indeed, it had to do, for the reason that *the barge was not owned by the respondent, but by the libelant and was also covered by the bill of lading.* The case is clearly not in point and is clearly distinguished in the case of *The Coastwise,* 233 Fed. 1, 3-4, where the court says:

> "In the Nettie Quill, (D. C.) 124 Fed. 677, the District Court, for the Southern District of Alabama had before it the fact that the owner of a steamer making regular trips had agreed to transport a locomotive, under a bill of lading in the usual form; he undertook to carry the locomotive on a barge, towed alongside, and belonging to the locomotive's owner. *This barge was also covered by the bill of lading.* The court held the contract to be one of affreightment, not of towage, and subject to the Harter Act. No such question arises in the case at bar. Here

the contract with the tug was clearly a contract of towage. *The bill of lading was made with the barge only, not with the tug.* There is nothing to indicate an attempt to combine the tug and barge into a single maritime adventure.

The general rule is stated by the Circuit Court of Appeals in the Second Circuit in The W. G. Mason, 142 Fed. 913, 918; 74 C. C. A. 83, 88, where in speaking for the court, Judge Wallace said:

> 'A tug and her tow are deemed a single vessel under steam, within the meaning of the rules of navigation for preventing collisions; but it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations as between themselves, or their several liabilities to respond for the consequences of a fault of one of them. Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault.' "

So, in the case at bar, *the bill of lading was made with the barge only, not with the steamer.* It is also to be noted that *The W. G. Mason,* 142 Fed. 913, above referred to, is one of the cases approved by the Supreme Court of the United States in the recent decision heretofore cited (see 64 L. Ed. at p. 132).

Petitioner also refers (as apparently its principal authority) to the case of *The Northern Belle,* 9 Wall. 526; 19 L. Ed. 746 (Brief, pp. 9-11). In that case the barge on which the carge was carried *was unseaworthy* and the court appeared to view the case as turning entirely on that point. As regards the concurring liability of the tug also, this can be better understood when one considers the decision of the lower court (reported under the name

of *The Keokuk,* Fed. Case No. 7,721), where it clearly appears that the tug was held in fault for proceeding at a speed of twelve miles an hour "in the night and in the shade of the surrounding timber, trees and evergreens" and "more intent upon speed than safety". The remark of this court that the barges "are generally considered as attached to and making part of the particular boat in connection with which they are used" is a mere *dictum* and is to be considered in the light of the later decision in the *Liverpool* case. The Harter Act had not been passed when the case was decided and was not in issue and, we may add, no proof whatever was adduced in the case at bar that the "Tennessee" was generally or at all considered a part of her towing steamer. It was for petitioner to offer such proof and not for respondent to negative it, but petitioner has left the court in the dark as to the functions of the "Tennessee" during the whole voyage (both on the upper and lower rivers) and of course respondent has no knowledge of these functions.

Petitioner refers frequently to the fact that the barge had no motive power and necessarily *had* to be towed, but this is an immaterial factor in the case. The same argument would be true as to *all* barges, but the books are full of cases where towing vessels have been held responsible for loss of or injury to barges or dredges. In this connection, petitioner in the Circuit Court of Appeals put the hypothetical case of a barge propelled by oars or sails or one of its own rowboats. It there said that there was no doubt that the Harter Act would apply in such a case and therefore asked what difference it made that *another boat* took the barge in tow. "But", says

Mr. Justice Holmes in the *Liverpool* case, supra, *"that is the question and it is not answered by putting it"*. The answer, of course, is that the Harter Act, under its own terms, *only applies to the vessel on which the cargo is being carried.*

We have then *this* situation. It is clearly laid down as a general principle of law, supported by the cases, that the Harter Act does not apply as between tug and tow, even when they are owned by the same person.

38 *Cyc.*, 591 (and cases there cited);
*The Delaware*, 161 U. S. 459; 40 L. Ed. 771;
*The Murrell*, 195 Fed. 483; 200 Fed. 826;
*The Coastwise*, 230 Fed. 505; 233 Fed. 1;
*Bradley v. Lehigh Valley R. R. Co.*, 145 Fed. 569; 153 Fed. 350;
*The case at bar.*

The last four cases cited are *directly in point*, and have already been sufficiently discussed in both of the briefs.

On the other hand *no cases in point* are cited by petitioner and the few dicta on which it relies not only have no application, but are apparently opposed to the latest ruling on the subject by the Supreme Court of the United States (*Liverpool* case, supra).

It is therefore submitted that the Harter Act clearly does not apply and we are brought to the second main heading of petitioner's argument.

## II.

### PETITIONER IS NOT EXEMPTED FROM LIABILITY BY THE TERMS OF THE SHIPPING RECEIPTS.

An examination of the petition for certiorari in this case will show that the sole question on which said petition was sought and granted was the applicability of the Harter Act and that no relief is asked for because of the terms of the shipping receipts. Nevertheless, as the whole case is before this court on the writ, we shall briefly discuss this subject.

The shipping receipts were issued for the barge "Tennessee" and provided, *inter alia:*

> "dangers of fire and navigation, or any other peril, accident or danger of the seas, rivers or steam navigation, or steam machinery of whatever kind or nature excepted".

There are three conclusive reasons why this clause cannot apply in this case, namely:

(a) The clause is only applicable to the barge and not to the towing steamer.

(b) The clause does not excuse negligent towage.

(c) Even if the clause did purport to cover negligent towage, it would be invalid.

#### (a) The Exceptive Clause is only Applicable to the Barge and not to the Towing Steamer.

This point has been incidentally discussed under the last heading and need not be elaborated.

The shipping receipts were issued for the carriage of the respondent's barley *on the barge* and apply to the

barge only and to the petitioner as the owner of the barge. They do not apply to the towing steamer or to the petitioner as the owner of that steamer. In fact no towing steamer is named in the shipping receipts (unless it be the steamer "Red Bluff", which was not used) and the towage could have been made by *any* steamer, whether belonging to the petitioner or not, and, if the steamer did not belong to petitioner, there could be no question as to liability. This inevitable conclusion makes sharply applicable the following language of the District Court in the case of *The Murrell,* 200 Fed. 826, 831-832:

> "There is no more reason for saying that the West Virginia's cargo may be called the cargo of the tug than for saying that the cargo of the other barge might be so described. Neither barge was being towed alongside the tug. Neither the subcharter of the barge nor the bill of lading given for the coal on board her has been offered in evidence, *and it does not appear that either of them refers to this or any particular tug as having any connection with the contract for transportation made with the owner of the coal.* To that contract the owner of the tug may indeed have been one of the parties, but there is nothing to show that anything to be done by this particular tug was contracted for. If the mutual obligations between cargo and carrying vessel could ever have arisen between the tug and the carge here in question, they could only have arisen from the fact that the tug was actually towing the barge containing the cargo, and they could have had no existence before such actual towage began. No reason whatever appears for calling the coal on board the barge cargo of the tug until the barge was taken in tow. Before that time there was no reason whatever for calling it the cargo of any other vessel than the barge. The petitioner's contention thus requires it to be regarded as at one time the cargo of the barge

> only and at a later time the cargo of the tug as well, there being also at that time another cargo with an equal claim to be regarded as the tug's cargo. *It is difficult to believe that a construction of the Harter Act which involves results of this kind could have been intended by Congress.*"

Also in *The Coastwise,* 233 Fed. 1, 3, the Circuit Court of Appeals for the First Circuit says:

> "It will be seen that, in The Murrell, this court had before it the case of an agreement by the owner of a tug to tow another owner's vessel; and this court held that there is nothing in such agreement to make the latter vessel, or her cargo, the cargo of the tug. In view of the reasoning of the Supreme Court in The Delaware, it seems clear also *that there is nothing in the agreement by the owner of a tug to tow another vessel which can be regarded as making the latter vessel, or her cargo, the cargo of the tug, even when such other vessel belongs to the same owner as the tug. And, in our opinion, this is the law.*"

In the case at bar the District Court says (Record, p. 4):

> "3. The grain that was lost belonging to Milton H. Salz was carried by the barge 'Tennessee' under a bill of lading issued *for it only and not for the towing steamer,* and though the towing steamer and the barge belonged to the same owner, the Harter Act does not apply."

The Circuit Court of Appeals (Record, p. 141) says:

> "The bill of lading was made with the barge and did not include the tug."

We submit that these citations are conclusive and that the present argument of petitioner is merely a repetition of its previous argument. If the Harter Act does not

apply to the towing steamer, then it is equally clear that the shipping receipts (which name no towing steamer) do not apply. The one proposition clearly follows the other.

The exceptions in the bill of lading would, if applicable, relieve *the barge* from the perils mentioned therein and we assume also that *the barge* could take advantage of the Harter Act. This suit, however, is brought against petitioner *as the owner of the towing steamer* and is based on *negligent towage* and not on the contract of affreightment made with the barge. And the towing steamer cannot take advantage of a shipping receipt to which it was not a party.

**(b) The Exceptive Clause does not Excuse Negligent Towage.**

The exceptive clause covers "*dangers* of fire and navigation, or any other peril, *accident* or *danger* of the seas". Such clauses, standing alone, obviously do not cover losses due to *negligence,* whether by collision or otherwise.

See 36 *Cyc.* (*Shipping*), 294-298 and cases there cited.

We also refer to the well settled rule that exceptions covering negligence must be made in the clearest kind of terms to be effective and there is not one word relieving petitioner from negligence in the case at bar, much less from negligent towage by a vessel not mentioned in the shipping receipts.

In *Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.,* 129 U. S. 397; 32 L. Ed. 788, 791, the Supreme Court says:

"In each of the bills of lading, the excepted perils, for loss or damage from which it is stipulated that the appellant shall not be responsible, include 'barratry of master or mariners', and all perils of the seas, rivers or navigation, described more particularly in one of the bills of lading as 'collision, stranding or other peril of the seas, rivers, or navigation, *of whatever nature or kind soever and howsoever such collision, stranding or other peril may be caused'*, and in the other three bills of lading described more generally as any 'accidents of the seas, rivers and steam navigation, of whatever nature or kind soever': and each bill of lading adds, in the following words in the one, and in equivalent words in the others, *'whether arising from the negligence, default or error in judgment of the master, mariners, engineers, or others of the crew, or otherwise howsoever'.*

*If the bills of lading had not contained the clause last quoted, it is quite clear that the other clauses would not have relieved the appellant from liability for the damage to the goods from the stranding of the ship through the negligence of her officers.* Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them. *General Mut. Ins. Co. v. Sherwood,* 55 U. S. 14 How. 351, 364, 365 (14:452); *Orient Ins. Co. v. Adams,* 123 U. S. 67, 73 (31:63, 66); *Copeland v. New Eng. M. Ins. Co.,* 2 Met. 432, 448-450. But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils, does not excuse him from that obligation or

> exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed. *N. J. Steam Nav. Co. v. Merchants Bank,* 47 U. S. 6 How. 344 (12:465); *U. S. Exp. Co. v. Kountze,* 75 U. S. 8 Wall. 342 (19:457); *Western Transp. Co. v. Downer,* 78 U. S. 11 Wall. 129 (20:160); *Grill v. General Iron Screw Collier Co.,* L. R. 1 C. P. 600, and L. R. 3 C. P. 476; *The Xantho,* L. R. 12 App. Cas. 503, 510, 515."

The cases last cited in the above case are directly in point and we ask the court to examine them. They hold that, entirely apart from the question as to whether a carrier *can* contract against negligence, general clauses such as those used in the case at bar (where negligence is not even mentioned) do not cover losses caused by negligence. Much less, may we add, can they be construed to cover the negligence of another vessel.

Petitioner expressly admits the validity of the above argument in cases of *common carriers,* but denies it in cases of *towage,* because, it says, in the latter case the clause has "nothing to operate upon except the negligence of those who do the towing" (Brief, p. 40). It forgets in this connection that, in the case at bar, the barge (with which the contract was made) had important functions to perform (especially on the upper river), and that the clause had ample scope for its operation *in connection with the barge alone* (the common carrier) without applying it to the towing steamer which is not mentioned therein. The argument in question therefore falls to the ground.

It seems to us that, after all is said and done, the discussion of this subject merely brings us back to where we started—namely, the effect of the Harter Act. If the Harter Act applies to a towing steamer under the circumstances of this case, petitioner is relieved from liability. If it does *not* apply, the general words used in the shipping receipts are clearly not sufficient to excuse negligence.

**(c) Even if the Exceptive Clause Did Purport to Cover Negligent Towage it would be Invalid.**

As stated by petitioner the above heading raises an important question on which the decisions are conflicting and which is of vast interest to all connected with shipping. We consider that it is in no way involved in this case *and it was not made one of the grounds of the petition for certiorari.*

This latter is very significant, for, if petitioner had considered the point as being really involved in the case, it would surely have taken advantage of the conflicting decisions in the Second and Ninth Circuits to obtain the writ (it having been unable to find any such conflict as to the applicability of the Harter Act). Nevertheless, so long as this point is *now* raised by petitioner and the whole case is before this Court, we feel that it is incumbent on us to briefly consider it, but we shall only present the broad outlines of the question and shall not attempt to deal with it in detail.

As long ago as 1870 the Supreme Court of the United States said in the case of *The Syracuse,* 12 Wall. 167; 20 L. Ed. 382, at p. 384:

"It is unnecessary to consider the evidence relating to the alleged contract of towage, because if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected and disaster occurs, the towing boat must be visited with the consequences."

This rule has (up to a very recent time) been consistently followed everywhere and is still followed in the Ninth Circuit, though repudiated in the Second, and it is held in the following cases that a towing steamer cannot relieve itself from liability for negligence.

*Deems v. Albany & Canal Line,* Fed. Case No. 3736 (Circuit Ct. S. D. N. Y.);

*The M. J. Cummings,* 18 Fed. 178 (D. C. N. D. N. Y.);

*The Rescue,* 24 Fed. 190 (D. C. W. D. Pa.);

*The American Eagle,* 54 Fed. 1010 (D. C. N. D. Ohio);

*The Jonty Jenks,* 54 Fed. 1021 (D. C. N. D. N. Y.);

*Re Moran,* 120 Fed. 556 (D. C. E. D. N. Y.);

*The Somers N. Smith,* 120 Fed. 569 (D. C. Me.);

*Alaska Commercial Co. v. Williams,* 128 Fed. 362 (C. C. A. 9th Circuit);

*Mylroie v. British Columbia etc. Co.,* 268 Fed. 441 (C. C. A. 9th Circuit);

*The Sea Lion,* 1926 Am. Mar. Cases 265 (D. C. Cal.).

The rule was not adhered to *in New York* in the case of *The Oceanica,* 170 Fed. 893, which has been followed by other cases in the Second Circuit and, by *dictum* only, in *The Pacific Maru,* 8 Fed. (2nd.) 166, by the District Court for the Southern District of Georgia. In *The Oceanica* the court recognized that its ruling was a departure from previous decisions, saying (at p. 900):

> "We do appreciate keenly that the decision of the majority of the court as to the right of a tug to contract against her own negligence is a departure from previous decisions. The question should, and we hope will, be set at rest in this case by the Supreme Court."

Judge Coxe dissented from the decision, saying in part:

> "The wisdom of the rule cannot be doubted. It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers, apply, though not, perhaps, to the same extent in the case of a towing contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it. I can see no reason for abrogating the rule and every reason why it should be continued."

We entirely agree that the wisdom of the rule (whether it is good law or not) "cannot be doubted". There is no monopoly better known in many ports than the monopoly of tow boat companies and any talk of freedom of contract with such a company is idle.

Petitioner makes much of the denial of *certiorari* by this court in *The Oceanica.* We do not, however, take this denial as being at all conclusive of the merits of the question and good reasons are given for it by Judge Ross in the *Mylroie* case, supra (268 Fed. at pp. 452-453; see also *The Sea Lion,* 1926 Am. Mar. Cases, Feb. issue, at p. 267). *Certiorari* was granted in the case last named, but the Supreme Court expressly refused to decide the question and left it open.

In *The Oceanica,* supra, it is to be noted that the majority opinion relies (in part at least) upon the fact that, under New York law, even a common carrier can relieve itself from liability for negligence and this has been considered a ground for distinguishing the cases in the Second Circuit (*Mylroie* case, supra).

The cases *The Maine,* 161 Fed. 401; 170 Fed. 916 and *The G. R. Crowe,* 287 Fed. 426; 294 Fed. 506, also cited by petitioner, involve a different subject matter and, as said by the Circuit Court of Appeals in the case at bar:

> "we do not see that either decision casts material light upon the question involved in the present case" (Record, p. 146).

Moreover, both cases arose *in New York,* where, as above pointed out, even common carriers may stipulate against their own negligence and naturally the rule of *The Oceanica* was followed. If *general* law and not the local New York law were applicable, however, we venture to suggest that in none of these cases did the court seem to consider the rule that a bailee for hire cannot stipulate against his own negligence. This latter rule (though not undisputed) is supported by the weight of authority in

the United States (6 *Corpus Juris,* 1112 and cases there cited in note 56; *Sporsem v. First Natl. Bank,* 233 Pacific 641, at p. 643, decided Feb. 26, 1925). And there is authority for likening a tug to a bailee for hire (*The Seven Sons,* 29 Fed. 543).

The foregoing are the main outlines of the question now under discussion. If it were really involved in the case at bar, its importance would render the method of treatment inadequate. We regard it as clearly established, however, that (a) the shipping receipts in this case were made with the barge and do not enure to the benefit of the towing steamer and (b) they clearly do *not* cover negligent towage. Hence the discussion of the present subject is largely academic, but (the point being relied on by petitioner) we have felt that we would not be justified in wholly overlooking it.

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## III.

### CONCLUSION.

It is now respectfully submitted on the whole case that neither the Harter Act nor the Shipping Receipts have any bearing on this case; that the usual law of tug and tow applies and that the decrees of the District Court and the Circuit Court of Appeals should be affirmed.

Dated, San Francisco, April 1, 1926.

Respectfully submitted,

S. Hasket Derby,
Carroll Single,
*Proctors for Respondent.*